NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/10/2021 10:10:00 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD616/2021
File Title:	WESTPAC BANKING CORPORATION ABN 33 007 457 141 & ANOR v FORUM FINANCE PTY LIMITED & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 1/10/2021 10:10:01 AM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Westpac Banking Corporation and anor v Forum Finance Pty Ltd and others
Federal Court of Australia NSD 616/2021

APPLICANTS' OUTLINE OF SUBMISSIONS FOR HEARING ON 1 OCTOBER 2021

Overview

1. The orders that the applicants (together, **Westpac**) seek at the hearing on 1 October 2021 are set out in the short minutes provided with these submissions and fall into three categories.

2. The first are orders that are connected to the primary reason why the matter is listed on 1 October 2021: the replacement of Mr Christopher Nehme of Fortis Law as the solicitor on the record for Mr Tesoriero (the third respondent) by Mr Sazz Nasimi of Madgwicks. Relevantly, a solicitors' undertaking was provided on 20 August 2021 by Mr Nehme that funds held in the trust account of Fortis Law would not be dealt with pending the establishment of a controlled moneys account held jointly in the name Fortis Law and MinterEllison. Fortis Law at one stage proposed to breach that undertaking and assert a right to appropriate at least part of those funds for their own benefit to meet the fees that they contend they have charged Mr Tesoriero to date. An order is sought directing Mr Nehme to perform his undertaking.

3. In relation to these orders, Westpac relies upon the affidavit of Caitlin Maria Murray sworn 30 September 2021 (**Murray 15**) and Exhibit CMM-13 (**CMM-13**), as well as certain pages from Exhibit CMM-10 (**CMM-10**) which are identified in the submission below and have been provided to the Court.

4. The second group of orders address the external administration of Forum Group Financial Services Pty Ltd (**FGFS**), Forum Enviro Pty Ltd (**FE**) and Forum Enviro (Aust) Pty Ltd (**FEA**) (the fourth, sixth and seventh respondents respectively). These companies currently have Jason Preston and Jason Ireland (the **Liquidators**) as their provisional liquidators. Westpac seeks orders that FGFS, FE and FEA be wound up on the just and equitable ground and on the basis that they are insolvent and that Mr Preston and Mr Ireland be appointed as their liquidators (that is, the same orders that the Court has made with respect to the first respondent, Forum Finance Pty Ltd (**Forum Finance**)).

5. In relation to these orders, Westpac relies upon the affidavit of Mr Ireland affirmed 29 September 2021 (**Ireland 2**) and Exhibit JI-2 (**JI-2**).

6. The third is an order directing Mr Panetta, the solicitor on the record for the second respondent, Mr Papas, until a notice of ceasing to act was filed on 27 September 2021, to provide all information he has about how to contact Mr Papas. This is because:

    a. the notice of ceasing to act that Mr Panetta filed records the last known residential or business address of Mr Papas as 23 Margaret St, Rozelle, in circumstances where it is common ground (and Mr Papas' and Mr Panetta's evidence to the Court) that Mr Papas is in fact currently residing overseas;

    b. the email address that Mr Papas had been using to communicate with the Liquidators (billpapas07@gmail.com) appears now to have been shut down late yesterday, presumably by Mr Papas.

Mr Nehme's undertaking

Relevant principles

7. The court has a supervisory jurisdiction in relation to undertakings given by solicitors in their professional capacity (which is not confined to undertakings given to the Court) that arises from the court's inherent right to insist upon and require honourable conduct on the part of the Court's own officers: *Wade v Licardy* (1993) 33 NSWLR 1 at 9 per Bryson J; *Carr v Council of Law Society of New South Wales* [2020] NSWCA 276 at [12]-[15] per White JA.

8. The basis of the discretionary jurisdiction to order a solicitor to perform his or her undertaking was summarised in *Hartnell v Birketu Pty Ltd* (2021) 392 ALR 154; [2021] NSWCA 201 at [131] by Gleeson JA (Basten and McCallum JJA agreeing) as follows:

> In short, the supervisory jurisdiction is both disciplinary and compensatory; enforcement of an undertaking is for the purpose of ensuring honourable conduct on the part of the Court's own officers, and is distinct from the legal rights and remedies of the parties; enforcement does not depend upon there being consideration for the undertaking. What distinguishes the enforcement of a voluntary promise by a solicitor from a similar promise made by an ordinary creditor is the fact that the undertaking is given by a solicitor in his or her professional capacity. As officers of the Court, solicitors are expected to abide by undertakings given by them professionally and, if they do not, they may be called upon to make good their defaults. Where the solicitor, directly or indirectly, still has it in his or her

> power to do the act which he or she undertook to do, the Court may order the solicitor to do that act.

9. Where it is inappropriate for the Court to make an order that the solicitor perform his or her undertaking, the Court may order the solicitor to compensate a person who has suffered loss in consequence of the solicitor's failure to give effect to the undertaking: *Udall v Capri Lighting Ltd (in liq)* [1988] QB 907 at 918 per Balcombe LJ (with whom Neill LJ agreed); cited with approval in *Carr* at [15].

10. The court's jurisdiction was recently discussed by the Supreme Court of the United Kingdom in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32; [2021] 3 WLR 598, a case which concerned a non-compete undertaking given by a law firm in relation to the English equivalent of a representative proceeding, which was held not to be a solicitor's undertaking. Lord Briggs, Lord Hamblen and Lord Burrows (with whom Lord Lloyd-Jones and Lady Arden agreed) noted that the Court's supervisory jurisdiction to enforce solicitors' undertakings is an aspect of its inherent jurisdiction over solicitors as officers of the Court which has its origin in medieval times when the profession of attorney emerged: at [94]-[95]. Their Lordships stated, at [101], that solicitors are expected to abide by solicitors' undertakings and may be called upon to do so summarily if they do not do so, noted, at [102], that such undertakings are frequently given in litigation and recognised, at [103] (explaining also the importance to the conduct of litigation and aspects of commerce more generally that a solicitor's undertaking can be relied upon), that the Court is concerned with undertakings given by solicitors in their professional capacity rather than in some other capacity, such as their private capacity.

11. At [112], their Lordships set out two questions that are helpful in determining whether an undertaking is given by solicitors in their "capacity as solicitors":

> The first concerns the subject matter of the undertaking and whether what the undertaking requires the solicitor to do (or not to do) is something which solicitors regularly carry out (or refrain from doing) as part of their ordinary professional practice. The second concerns the reason for the giving of the undertaking and the extent to which the cause or matter to which it relates involves the sort of work which solicitors regularly carry out as part of their ordinary professional practice. If both questions are answered affirmatively then the undertaking is likely to be a solicitor's undertaking.

12. At [127], their Lordships commented on the importance of such undertakings in conveyancing, but these observations could apply equally to the conduct of civil litigation in this court:

> There can be no doubt that the underpinning of those undertakings by the availability of rapid summary enforcement under the court's supervisory jurisdiction has been a significant buttress for their reliability, and for the propriety of accepting them as part of the every-day machinery for modern conveyancing. This is not because there is a history of frequent non-compliance followed by court enforcement. Rather, the mere existence of that ready and swift means of enforcement made it inherently unlikely that a solicitor would fail to comply. The undertaking did not depend for its enforcement upon it being given contractually, supported by consideration. Thus a solicitor's undertaking has a value greater than that of the client for whom the solicitor acts.

Relevant facts

13. On 2 July 2021, the Court made freezing orders against Mr Tesoriero. Those orders were varied and extended on 9 July 2021 and 27 August 2021: Murray 15 [4].

14. On 17 August 2021, MinterEllison received a letter from Fortis Law (Murray 15 [25(a)]; CMM-10, pp 624-625) disclosing that:

    a. Mr Tesoriero had entered a contract for the purchase of property located at 8-12 Natalia Ave Oakleigh South, Victoria 3167 and part Common Property PS 716735J being the land now comprised in Certificate of Title Volume 12298 Folio 008 (**Oakleigh Property**). Pausing there, that chose in action was not identified as an asset of Mr Tesoriero's in his affidavit of assets;

    b. the completion date for that sale had been extended until 20 August 2021, but that Mr Tesoriero was not in a position to complete the purchase, as a consequence of which Mr Tesoriero was notifying Westpac that a new purchaser had been identified who would pay Mr Tesoriero a nomination fee of $1,200,000 and assume the obligations under the contract;

    c. Mr Tesoriero would consent to the $1,200,000 that the purchaser would pay being paid into court or to a joint account held in the name of Fortis Law and MinterEllison.

15. To date, Westpac's investigations have revealed that an amount of $1,172,000 has been paid from FGFS in relation to the purchase as the Oakleigh Property as follows:

    a. on 19 December 2019 a payment in the amount of $586,000 with the description "Deposit 12 Natalia" was made from the FGFS account: CMM-13 p.31;

    b. on 9 June 2020, a further payment in the amount of $586,000 with the description "Natalia Deposit" was made from the FGFS account: CMM-13 p.59.

16. Receipts have been located during Westpac's investigations which show that the payments were received as payment of the deposit for the purchase of the Oakleigh Property: CMM-13 p.154 and p.155.

17. Accordingly, Westpac has a strong *prima facie* case that money that was misappropriated from it and paid in to FGFS's bank account was used to fund the deposit paid for the Oakleigh Property, which transaction led to the payment of $1,200,000 by a new purchaser. Further payments totaling about another $800,000 which have been made by FGFS to discharge, it appears, costs associated with improving the property have been identified: CMM-13 p.153.

18. On 19 August 2021, Fortis Law provided to MinterEllison a copy of the draft nomination deed. However, the arrangement in the nomination deed differed to that described in the email from Fortis Law, in particular that instead of a nomination fee of $1,200,000, the nomination deed contemplated a reimbursement of the deposit of $1,172,000 (less certain deductions) being paid to Mr Tesoriero: CMM-10 p.749 at p.755. Pausing there, the evidence demonstrates a *prima facie* proprietary claim over the whole of the payment of $1,172,000.

19. On 20 August 2021, Mr Nehme sent an email to MinterEllison that was in the following terms: CMM-10 p.770:

From: Christopher Nehme <cnehme@fortislaw.com.au>
Sent: Friday 20 August 2021 12:20 PM
To: Anthony Sommer <Anthony.Sommer@minterellison.com>
Cc: Caitlin Murray <Caitlin.Murray@minterellison.com>; Pierre Safi <pjsafi@fortislaw.com.au>; Joshua Frangi <jfrangi@fortislaw.com.au>; Ramsha Sulaman <ramsha@fortislaw.com.au>; Roy Hanna <rhanna@fortislaw.com.au>; Michael Hughes <Michael.Hughes@minterellison.com>; Andrew Clarke <Andrew.Clarke@minterellison.com>; Sarah Colegrove <scolegrove@fortislaw.com.au>; 'Ken Gray' <KGray@abl.com.au>
Subject: RE: Tesoriero, Papadimitriou and Forum Finance Pty Ltd ats Westpac Banking Corporation Pty Ltd Federal Court of Australia Proceeding NSD616/2021 [ME-ME.FID6264995]

Dear Mr Sommer,

We note your email.

Please confirm that your client, in the interim, will consent to the funds being held in our Trust Account until such time as a joint account is established.

Fortis Law will undertake not to deal with those funds until such time as the appropriate account is established.

Our account's department will make enquiries to set up a Controlled Monies Account forthwith. I have copied in Ms Colegrove our accounts manager who can liaise with your accounts department.

Please feel free to contact me.

Regards

Christopher Nehme
Partner

20. By this email, Mr Nehme gave a solicitor's undertaking on his behalf and those of his partners "not to deal with those funds until such time as the appropriate account is established" (the **Undertaking**).

21. On the basis of this undertaking, MinterEllison indicated that it consented to the funds being held in the trust account of Fortis Law until such time as a joint account was established: CMM-10 p.770. However and despite repeated request by MinterEllison (CMM-13, p.156-p.164), a controlled monies account has not yet been established by Fortis Law.

22. On 16 September 2021, MinterEllison sought an update in relation to the establishment of the joint controlled monies account, and sought clarification as to why Fortis Law only held the amount of $773,362.88: CMM-13 p.158.

23. Instead of confirming arrangements for the opening of a joint controlled monies account on 21 September 2021, Mr Safi of Fortis Law sent an email to MinterEllison which said that Fortis Law no longer acted for Mr Tesoriero and said that the amount it held would be held "as security for payment of legal fees in this matter or further order of Court": CMM-13 p.157. This email was copied to Mr Tesoriero's new solicitors, Mr Sazz Nasimi of Madgwicks.

24. Further correspondence was exchanged between MinterEllison and Fortis Law between 21 September 2021 and 29 September 2021 in relation to the Undertaking which had been given the failure to establish a joint controlled money account and the Trust Amount held by Fortis Law: Fifteenth Murray Affidavit [27]-[28].

25. On 28 September 2021, Mr Safi of Fortis Law sent an email to MinterEllison in relation to the Undertaking and the amount held by Fortis Law in the following terms: CMM-13 p89-290:

> To be clear, we stand ready to facilitate any arrangement which is consistent with preserving the status of the trust money, whether it be in a controlled money account held between Fortis and Minters, whether it be in a controlled money account held between Madgwicks and Minters or whether it be deposited in Court.
> …
> In the interim, until we hear further from the you and Mr. Nasimi of Madgwicks our firm will continue to hold the sum of $773,362.88, undisturbed, in our trust account.

26. Mr Nasimi was copied to this correspondence.

27. On 29 September 2021, MinterEllison received an email from Mr Nasimi of Madgwicks which asserted that placing the amount held by Fortis Law into a joint controlled monies account would be counterproductive and sought that the funds be released to Madgwicks

in order to "address the fees accumulated by Fortis law [sic], and then thereafter be held by Madgwicks in order to secure its fees and to also meet any ordinary and reasonable business expenses that may arise": CMM-13 p.297.

Application to the facts

28. The Undertaking was given by Mr Nehme in his capacity as a solicitor. This is because it was given in the course of him acting as solicitor on the record for Mr Tesoriero in this proceeding and dealing with MinterEllison, solicitors for Westpac, in that role. Giving an undertaking to hold funds on a particular basis while the solicitors can attend the formalities of establishing a controlled monies account is something which solicitors regularly do in the course the sort of work which solicitors regularly carry out as part of their ordinary professional practice.

29. Accordingly, the Undertaking is one over which the Court has supervisory jurisdiction. While the exercise of the Court's power to make an order (relevantly under s 23 of the *Federal Court of Australia Act 1976* (Cth)) in this supervisory jurisdiction is discretionary, there are no discretionary factors which would cause the Court to decline to make an order directing Mr Nehme to perform his undertaking. In particular, the email dated 17 August 2021 indicated that Mr Tesoriero consented to the funds being held in a controlled account. The evidence otherwise shows a strong prima facie claim by Westpac to those funds. Mr Nehme should be ordered to perform the Undertaking.

30. Westpac did not agree to those funds being dealt with in any other manner. That is unsurprising. Given the strength of the proprietary claim there is no apparent basis for Mr Tesoriero to have use of those funds: *Birketu Pty Limited v Westpac Banking Corporation (No 2)* [2018] NSWSC 494 at [60]-[68]; *National Australia Bank Limited v Human Group Pty Limited (No 2)* [2020] NSWSC 1900 at [110]. But for present purposes it is unnecessary to go so far. Mr Nehme's undertaking should be enforced.

The winding up applications

31. By the Third Further Amended Originating Application filed on 23 September 2021 (**3FAOA**), the applicants seek order for the winding up of FGFS (prayer 22); FE (prayer 38); and FEA (prayer 46) under the provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**). In respect of each of FGFS, FE and FEA, the applicants also seek an order for the appointment of the Liquidators as joint and several liquidators (see prayers 23, 39 and 47 of the 3FAOA).

32. The Liquidators are presently, and have been since orders were made in these proceedings on 15 July 2021, the joint and several provisional liquidators of each of FGFS, FE and FEA.

33. The Liquidators are presently the liquidators of other entities within the Forum group, including Forum Finance: Ireland 2 [11], the entity to which Westpac paid funds pursuant to the fraudulent equipment financing scheme. Forum Finance in turn paid the majority of these funds to FGFS: Ireland 2 [14(c)].

34. Westpac seeks the winding up of FGFS, FE and FEA pursuant to:

    a. s 461(1)(k) of the Corporations Act on the basis that is it just and equitable that each be wound up; further and alternatively

    b. s 459P, on the basis that FGFS, FE and FEA are insolvent.

35. Westpac has proprietary claims against each of FGFS, FE and FEA on the basis set out in its 14 July submissions at [20]-[21], namely – on the face of the current evidence, each of FGFS, FE and FEA has received funds from Forum Finance which was stolen from Westpac. In the circumstances, Westpac is a creditor of each of FGFS, FE and FEA. Westpac has standing to bring the winding up applications: ss 459P and 462 Corporations Act.

36. The Court can order the winding up of a company on just and equitable grounds where there the company was created and operated from inception on fraudulent grounds; where the company is unable to carry on a business; and the management of the company has acted fraudulently: *ASIC v Centro Financial Synergy Group* [2007] FCA 2084 at [5].

37. The Court should proceed to wind up FGFS, FE and FEA for the following reasons.

38. *First,* FGFS, FE and FEA are each insolvent. The solvency and conduct of FGFS, FE and FEA is set out in Westpac's 9 July submissions: see [28]-[36] and 14 July submissions: see [17]-[24]. Further, Mr Ireland confirms in Ireland 2 that FGFS, FE and FEA are insolvent. Relevantly Mr Ireland deposes that based on his investigations:

    a. FGFS does not have sufficient funds to discharge its liabilities: Ireland 2 [19(b)];

    b. FE does not have sufficient funds to discharge its liabilities: Ireland 2 [23]; and

    c. FEA does not have sufficient funds to discharge its liabilities: Ireland 2 [25].

39. This evidence establishes that FGFS, FE and FEA are each insolvent, and this alone is a sufficient basis to order the winding up of FGFS, FE and FEA.

40. *Secondly*, none of the entities has an ongoing business or the capacity to carry on a going concern: Ireland 2 [26].

41. *Finally,* as set out at [37]-[46] of Westpac's 14 July submissions, each of the entities has, prima facie been involved in the fraudulent conduct the subject of these proceedings.

    a. The commonality of directors means that each of FGFS, FE and FEA will be imputed with the knowledge of Mr Papas as to the existence and operation of the fraudulent scheme: *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 CLR 421 at [94]-[105]. With this knowledge each entity has received funds stolen funds.

    b. In the case of FGFS, the Liquidators investigations reveal that FGFS did not operate a legitimate business: Ireland 2 [19(a)], its purpose being to receive monies from, among other entities, Forum Finance.

    c. In addition, Mr Papas conduct as director is sufficient to demonstrate a lack of confidence in the conduct and the management of each of FGFS, FE and FEA sufficient to warrant their winding up on just and equitable grounds: *ASIC v ABC Fund Managers* [2001] VSC 383; (2001) ACSR 443 at [119].

42. In the circumstances, the Court should order the winding up of FGFS, FE and FEA.

Disclosure of Mr Papas' contact details

43. Rule 4.04 of the Federal Court Rules deals with the termination of a retainer by a party. Rule 4.04(1) provides that if a party terminates a lawyer's retainer and appoints a new lawyer, the new lawyer must file a notice of acting. Rule 4.04(2) provides that if a party terminates a lawyer's retainer, and a new lawyer is not appointed, the party must file a notice of termination of the lawyer's retainer and a notice of address for service.

44. Rule 4.04(3) applies if a party does not file the documents required by rule 4.04(2) after terminating a lawyer's retainer. In that circumstance, the lawyer whose retainer has been terminated may file a notice of ceasing to act in accordance with Form 8. Form 8 requires the lawyer to give their client's last known residential or business address.

45. Mr Panetta filed a notice of ceasing to act on 27 September 2021. This notice gave Mr Papas' last known residential or business address as 23 Margaret St, Rozelle. This cannot be the address that Mr Papas is residing at, given it is common ground that Mr Papas is outside Australia. When Mr Papas swore his affidavits on 29 July 2021, he was in Greece.

46. Westpac seeks an order that Mr Panetta disclose to the Court and to the parties all contact information that he has to contact Mr Papas directly or indirectly (for example, through Mr Agostino who is now also in Greece with Mr Papas).

47. Subject to one caveat, such an order is appropriate in the circumstances because:

    a. Mr Papas has failed to comply with rule 4.04(2) and provide an address for service;

    b. the purpose and intent of rule 4.04(3) and Form 8 is to place upon the lawyer whose retainer is terminated an obligation to inform the Court and the parties of an address at which the party can be contacted, and therefore the order sought is consistent with the rationale for rule 4.04(3); and

    c. given Mr Papas is not in Australia, the address that Mr Panetta provided cannot be used to contact Mr Papas or provide documents to him for his attention.

48. The caveat is this. While not clear whether Mr Papas asserts that the communication of his address to Mr Panetta was on an occasion attracting legal professional privilege, it is possible he may make that assertion: although see *R v Bell; ex parte Lees* (1980) 146 CLR 141. To protect that possibility Mr Panetta should be ordered to disclose information that he has to contact Mr Papas directly or indirectly, within 7 days and subject to further order in the event that Mr Papas seeks to prevent disclosure.

Date: 1 October 2021

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